NO. 47689-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES SATIACUM, III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Philip K. Sorensen, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. ADMISSION OF A WITNESS'S OUT-OF-COURT STATEMENT TO POLICE, IN VIOLATION OF THE CONFRONTATION CLAUSE, REQUIRES REVERSAL.

The State has failed to cite any authority or facts in the record to support its argument that the statement at issue in this case is not testimonial hearsay, admission of which violates the Confrontation Clause. See Brief of Respondent at 11. Since the State, as the proponent of the evidence, bears the burden of establishing that the statement is non-testimonial, State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838, rev. denied, 177 Wn.2d 1021 (2013), this should be viewed as a concession that Satiacum's constitutional rights under the Confrontation Clause were, in fact, violated.

The State's argument on harmless error also fails to pass muster. The constitutional error of admitting testimonial statements in violation of the Confrontation Clause is presumptively prejudicial. State v. DeLeon, 185 Wn. App. 171, 211, 341 P.3d 315 (2014) review granted in part, 184 Wn.2d 1017 (2015) (citing State v. Lui, 179 Wn.2d 457, 528, 315 P.3d 493 (2014)). Reversal is required unless the State can show beyond a reasonable doubt that the error did not contribute to the jury's verdict. State v. Fraser, 170 Wn. App. 13, 23-24, 282 P.3d 152 (2012) (citing State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012)). To meet the State's burden, it must show the untainted evidence is "so overwhelming it necessarily leads to a finding of

guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The State's brief initially cites to the appropriate standard, but then fails to make any arguments applying this standard to the facts of this case. See Brief of Respondent at 8-11.

The State argues only that the untainted evidence was "ample," and "sufficient," and that the "jury had bases" for its verdict. Brief of Respondent at 8, 10, 11. The State's burden to prove constitutional error is harmless requires more than merely a sufficient factual basis for a jury verdict. Burke, 163 Wn.2d at 222. For example, in State v. Coristine, 177 Wn.2d 370, 382-83, 300 P.3d 400 (2013), the court rejected a harmless error argument regarding a jury instruction declaring, "We do not share the dissenters' confidence that the instruction was inconsequential." The court recognized that the instruction might have been the "'slight impetus'" that affected the verdict. Id. at (quoting Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

Satiacum asks this Court to recognize that the evidence admitted in violation of his right to confront witnesses was not inconsequential and may have provided the slight impetus the jury needed to convict. Because the State has failed to prove the error harmless beyond a reasonable doubt, reversal is required.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.[1]

The trial court found Satiacum indigent and entitled to appointment of appellate counsel at public expense. CP[2] 106-07 (Order of Indigency, filed June 11, 2015). If Satiacum does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Satiacum's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court

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[1] Recently in State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 (no. 72102-0-I, filed Jan. 27, 2016), Division One of this Court held that the issue of ability to pay appellate costs cannot be raised after a cost bill is filed, but must be raised so that it can be addressed in this Court's decision on the merits. It is unknown at this time whether the State will be the prevailing party and if so whether it will seek costs on appeal. However, based on Sinclair, Satiacum wishes to place the issue before this Court. Satiacum brings this issue to the Court's attention for the first time in this reply brief because Sinclair had not been decided when the brief of appellant was filed.

[2] A supplemental designation of clerk's papers was filed on March 21, 2016. Counsel anticipates the Order of Indigency will be indexed as Clerk's Papers pages 106 and 107.

waived non-mandatory legal financial obligations and recoupment for the public defender's office, specifically finding Satiacum was still indigent. 1RP 390; CP 64, 106-07. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Satiacum has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Satiacum requests this Court reverse.

DATED this 29TH day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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for JENNIFER J. SWEIGERT
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Attorney for Appellant

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Respondent,	)	
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vs.	)	COA NO. 47689-4-II
	)	
CHARLES SATIACUM,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MARCH, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHARLES SATIACUM
DOC NO. 851943
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MARCH 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 29, 2016 - 3:12 PM

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